

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEMONE DOMINIQUE HALL,

Defendant-Appellant.

UNPUBLISHED

July 24, 2014

No. 315691

Wayne Circuit Court

LC No. 12-007551-FC

Before: MARKEY, P.J., and OWENS and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of armed robbery, MCL 750.529, for which he was sentenced to serve 15 to 30 years' imprisonment. We affirm.

Defendant first argues that there was insufficient identification evidence to convict him of armed robbery, and for that same reason, he argues that the conviction was against the great weight of the evidence.

We review de novo claims of insufficient evidence. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). "We examine the evidence in a light most favorable to the prosecution, resolving all evidentiary conflicts in its favor, and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *Id.* However, we review "a trial court's decision on a motion regarding the great weight of the evidence for an abuse of discretion," which occurs when a trial court "selects an outcome that is not within the range of reasonable and principled outcomes." *People v Roper*, 286 Mich App 77, 84; 777 NW2d 483 (2009).

Identification is an essential element of every crime, *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976), which may be established through circumstantial evidence and reasonable inferences arising from the evidence. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). "The credibility of identification testimony is a question for the trier of fact that we do not resolve anew." *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). "Moreover, this Court has stated that positive identification by witnesses may be sufficient to support a conviction of a crime." *Id.*

There was sufficient identification evidence at trial to support the jury verdict of armed robbery. Earlier that day, the victim was on a service call for cable installation. His manager

was parked next to him, waiting for him to complete his work, when a man approached her vehicle from behind. She found it abnormal that the man was wearing a gray hooded sweatshirt and sweatpants, despite the fact that it was approximately 85 degrees outside. Finding the man suspicious, the manager drove her truck down the street, and then returned to park “nose to nose” with the victim’s truck. The man, however, approached her again, this time sticking his head and hands through her open driver-side window, scanned her vehicle, and then asked for a lighter to light his cigarette. The manager gave the man a lighter, and as he walked away, she used her cell phone to take pictures of him.

After the victim completed his work, his manager and he parted ways, and he went to a restaurant for lunch, where the robbery occurred. Although the victim was unable to remember defendant’s facial features and characteristics, he did identify that defendant was wearing a gray hooded sweatshirt, gray sweatpants, and that he was approximately six feet tall, with medium to light skin complexion. The manager identified that same man who approached her earlier from security camera footage taken outside the restaurant where the robbery occurred. Though the video is not sufficiently clear to identify facial features, the manager stated that the man in the video was wearing the same clothes, had the same weight and posture, and the same height as the man who had approached her vehicle earlier that day. The manager identified defendant as that man from a photographic lineup.

Defendant argues that the manager’s testimony was incredible because defendant’s facial features were not visible in the security camera footage. However, as discussed, the manager had an ample opportunity to observe the man who approached her vehicle, including his height, weight, posture, skin color, and clothing, and this Court has made it clear that we will not disturb the trier of fact’s credibility determinations regarding identification testimony. Therefore, we conclude that sufficient identification evidence existed to support defendant’s armed robbery conviction and it was not against the great weight of the evidence.

Defendant next argues that the trial court erred when it gave a flight instruction to the jury. “Claims of instructional error are generally reviewed de novo by this Court, but the trial court’s determination that a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion.” *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). Jury instructions must include all elements of the charged offense, as well as material issues, defenses, and theories that have evidentiary support. *Id.* We review the instructions in their entirety, and reversal will not be warranted unless the instructions failed to adequately protect the defendant’s rights by fairly presenting to the jury the issues to be tried. *Id.*

The trial court instructed the jury on the following:

There has been some evidence that the Defendant left the scene and hid after the alleged crime. There has been some evidence that the Defendant ran away from one of the police officers. This evidence does not prove guilt. A person may run or hide for innocent reasons, such as panic, mistake or fear. However, a person may also run or hide because of a consciousness of guilt. You must decide whether the evidence is true, and if true, whether it shows that the Defendant had a guilty state of mind.

One of the issues in the case is the identification of the Defendant as the person who committed the crime. The prosecution must prove beyond a reasonable doubt that the crime was committed and that the Defendant was the person who committed the crime.

Defendant specifically challenges the trial court's statement that "there has been some evidence that the Defendant left the scene and hid after the alleged crime," arguing that this removed the issue of identification from the jury. Defendant, however, ignores the full context of the trial court's instruction. The trial court specifically stated that the jury must decide whether the evidence was true. Further, immediately after providing the flight instruction, the trial court instructed the jury that identification of defendant as the person who committed the crime was an issue in the case, and that the jury must decide whether defendant was that person. Finally, the trial court's instruction was supported by evidence presented at trial, in that the police officer specifically testified that defendant ran when approached. Accordingly, the trial court did not abuse its discretion when it provided the flight instruction.

Defendant next argues that the prosecutor impermissibly urged the jury to decide the case based on sympathy for the victim. We review de novo issues of prosecutorial misconduct to determine whether the defendant was denied a fair and impartial trial. *Dobek*, 274 Mich App at 63; *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004). Comments made by the prosecution must be read as a whole and evaluated in the context of a defendant's arguments and the relationship they bear to the evidence admitted at trial. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005).

At the outset of its closing argument, the prosecutor stated that "[b]eing robbed at gunpoint is everyone's worst nightmare." Defendant, in a conclusory manner, argues that this statement was improper because it was intended to incite sympathy for the victim. See *Dobek*, 274 Mich App at 80 ("It is improper for a prosecutor to seek the jury's sympathy for a victim."). Because defendant failed to object to this statement, we review this unpreserved claim for plain error affecting defendant's substantial rights. *People v Unger (On Remand)*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008). When viewed in context, the prosecutor used the statement to open her closing argument in an attempt to argue that generally, being the victim of an armed robbery is an unwanted experience, and thus was not an attempt to incite sympathy. The statement was brief, and given that the trial court instructed the jury that the attorneys' statements were not evidence and that it should not convict based on sympathy, we cannot conclude that the claimed error denied defendant a fair and impartial trial. See *id.* (noting that jurors are presumed to follow the trial court's instructions, which are sufficient to cure any prejudicial effect of an improper prosecutorial statement).

Defendant also argues that it was impermissible for the prosecutor to state "we need to put ourselves into the mind of an armed robbery victim." As defendant correctly discusses, generally, prosecutors are prohibited from asking jurors to place themselves in the position of the victim. *People v Cooper*, 236 Mich App 643, 653; 601 NW2d 409 (1999); *People v Leverette*, 112 Mich App 142, 151; 315 NW2d 876 (1982), overruled on other grounds by *People v Wakeford*, 418 Mich 95, 110-113 (1983). Although this statement, on its face, is prohibited, when viewed in context the prosecutor's argument was proper. The prosecution was addressing the fact that the victim could not identify defendant as the man who robbed him due to his fearful

state of mind at the time of the robbery. The statement was a proper argument in favor of the victim's credibility as a witness, in that although the victim could not identify defendant as the man who robbed him, his other testimony regarding defendant's clothing was still reliable. The statement was not an invitation to the jurors to put themselves in the victim's situation for the purpose of inciting sympathy for him; rather, it was an attempt to explain the victim's inability to identify defendant. Further, as discussed, any prejudicial effect of the alleged error was cured by the trial court's instructions.

Affirmed.

/s/ Jane E. Markey

/s/ Donald S. Owens

/s/ Karen M. Fort Hood